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No. 84-490

In the Supreme Court of the United States

OCTOBER TERM, 1984

TEXAS OIL AND GAS CORP., PETITIONER

v.

ARKLA EXPLORATION COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary's determination, pursuant to Section 17 of the Mineral Leasing Act, that certain lands within Fort Chaffee, Arkansas, were not "within any known geological structure of a producing oil and gas field," and accordingly are available for noncompetitive leasing, was arbitrary and capricious.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. Exh. 6) is reported at 734 F.2d 347. The opinions of the district court (Pet. App. Exhs. 4 and 5) are reported at 548 F. Supp. 466 and 562 F. Supp. 1214.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1984. An order denying petitions for rehearing was entered on July 3, 1984. The petition for a writ of certiorari was filed on September 27,

1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 17 of the Mineral Leasing Act of 1920, 30 U.S.C. 226, provides in relevant part:

> (a) All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.
>
> (b)(1) If the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations in units of not more than six hundred and forty acres, which shall be as nearly compact in form as possible, upon the payment by the lessee of such bonus as may be accepted by the Secretary and of such royalty as may be fixed in the lease, which shall be not less than 12½ per centum in amount or value of the production removed or sold from the lease.
>
> * * * * *
>
> (c) If the lands to be leased are not subject to leasing under subsection (b) of this section, the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding. Such leases shall be conditioned upon the payment by the lessee of a royalty of 12½ per centum in amount or value of the production removed or sold from the lease.

STATEMENT

1. Section 17 of the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. 226, authorizes the Secretary of

the Interior to lease federal lands "known or believed to contain oil or gas deposits * * *." Federal oil and gas leases are divided into two classes, popularly known as "competitive leases" and "noncompetitive leases." Section 17(b)(1) of the MLA, 30 U.S.C. 226(b)(1), provides that "[i]f the lands to be leased are within any known geological structure of a producing oil and gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding * * *." In contrast, Section 17(c), 30 U.S.C. 226(c), provides that "[i]f the lands to be leased are not subject to leasing under subsection (b) of this section the person first making application for the lease * * * shall be entitled to a lease without competitive bidding."

Section 32 of the MLA, 30 U.S.C. 189, authorizes the Secretary to prescribe rules and regulations and to take other actions to carry out the purposes of the Act, including, specifically, "to fix and determine the boundary of any structure, or oil or gas field, for the purposes of this Act." Accordingly, the question whether given lands that the Secretary of the Interior has decided to lease should be leased competitively or noncompetitively turns on whether the lands are determined by the Secretary to lie within a known geological structure of a producing oil and gas field (KGS).[1]

2. Prior to 1976, Congress had not provided any statutory authorization for mineral leasing on military lands that had been purchased or otherwise ac-

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[1] While the MLA authorizes the Secretary to issue oil and gas leases, it does not require him to do so. The Act "left the Secretary discretion to refuse to issue any lease at all on a given tract." *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965).

quired from private owners (rather than reserved from the public domain). By enactment of Section 12 of the Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 95-554, 90 Stat. 1090, however, Congress authorized the Secretary of the Interior to issue mineral leases, under the provisions of the MLA, for acquired lands located within military bases.[2]

In May 1977, petitioner filed applications for 38 noncompetitive oil and gas leases covering 78,000 acres within Fort Chaffee, Arkansas. Under procedures then in force, the Bureau of Land Management (BLM) referred petitioner's lease applications to the Area Geologist of the United States Geological Survey (USGS) in Tulsa, Oklahoma, for a determination as to whether any of the lands sought to be leased are located within a KGS.[3] The Area Geologist determined certain lands covered by petitioner's applications to be within KGS's, and other lands to be outside any KGS. Ultimately, 18 of petitioner's applications, covering 45,000 acres, were rejected for various reasons. The remaining 20 applications, covering approximately 33,000 acres, were accepted. Leases covering these lands, with an effective date of July 1, 1979, were issued to petitioner. Pet. App. Exh. 5, at 5-6.

In September 1979, respondent Arkla Exploration Company (Arkla) filed two separate lawsuits chal-

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[2] Such leasing requires the consent of the head of the executive department having jurisdiction over the lands for which the leases are to be issued. 30 U.S.C. 352.

[3] Both BLM and USGS are agencies within the Department of the Interior. By virtue of agency reorganizations that occurred after the referral in this case, KGS determinations are now performed by BLM.

lenging the issuance of petitioners' leases, one in the United States District Court for the Western District of Arkansas and one in the United States District Court for the District of Columbia. Upon Arkla's motion, the cases were later consolidated in the District of Columbia District Court. In addition, Arkla filed a protest with BLM concerning petitioners' leases. Pet. App. Exh. 4, at 7.

That same month, the Secretary directed the USGS to reevaluate its non-KGS classification of the Fort Chaffee lands. The subsequent report, known as the "Girard Report," concluded that "the Fort Chaffee negative KGS determination is correct in a legal sense." See Pet. App. Exh. 6, at 12.

3. On November 1, 1979, petitioner, apprehending that its leases were in danger, filed its own suit in the United States District Court for the District of Columbia seeking an order prohibiting the Secretary from cancelling the leases. Before any judicial order was issued, however, the Secretary issued a decision cancelling petitioner's leases. The reason given for the cancellation was that the applications had been filed prior to September 21, 1978, the effective date of new regulations intended to effectuate the 1975 statutory change which had removed the prohibition against mineral leasing on acquired military lands. Prior to September 21, 1978, Interior's regulations had tracked the former statutory scheme and had prohibited leasing of such lands.

Petitioner then amended its complaint to challenge the Secretary's cancellation of its leases. On September 25, 1980, however, the district court sustained the cancellation. *Texas Oil and Gas Corp.* v. *Andrus*, 498 F. Supp. 668 (Pet. App. Exh. 1). Petitioner appealed.

While petitioner's appeal was pending, the District of Columbia district court found Arkla's separate suit to be moot and dismissed it without prejudice (Pet. App. Exh. 3). No appeal was taken from this order. BLM also issued an order dismissing as moot Arkla's administrative protest of the leases to petitioner (Pet. App. Exh. 6, at 7-8).[4]

On June 11, 1982, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's decision in the case brought by petitioner, ruling that petitioner's leases were validly issued and must be reinstated. *Texas Oil and Gas Corp.* v. *Watt*, 683 F.2d 427 (*TXO*) (Pet. App. Exh. 2). The court reasoned that the 1976 statute permitting the Secretary to lease the Fort Chaffee lands had made the lands immediately subject to leasing without the necessity of any implementing regulation. The court accordingly held that the Secretary had acted in excess of his authority in cancelling petitioner's leases.

4. On August 4, 1982, before the Secretary had acted to reinstate petitioner's leases pursuant to the District of Columbia Circuit's decision in *TXO*, Arkla initiated the present action against the Secretary in the United States District Court for the Western District of Arkansas. Petitioner was later joined as a party defendant in the action. By its complaint, Arkla alleged, inter alia, that the Secretary had abused his discretion by determining that the lands leased to petitioner were not within a KGS and thus available for noncompetitive leasing under Section 17 of the MLA. Arkla sought an order barring the Secretary from reinstating the leases. The State of

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[4] BLM's order was issued on January 3, 1980, after the Secretary had cancelled the leases but before the district court had decided petitioner's suit.

Arkansas, which was subsequently given leave to intervene as a plaintiff, raised substantially the same issues and sought the same relief as Arkla.

The Secretary and petitioner moved to have this case transferred to the District of Columbia district court. Those motions were denied from the bench (Pet. App. Exh. 5, at 8). In addition, the Secretary and petitioner moved to dismiss on various grounds and to confine judicial review to the administrative record. These motions were likewise denied. The district court held that: (1) Arkla and the State had standing; (2) the MLA created a private right to maintain the action; (3) the suit was not barred by collateral estoppel; (4) the plaintiffs were not obliged to exhaust their administrative remedies; and (5) the action was not precluded by the statute of limitations (Pet. App. Exh. 4). In denying the motion to confine judicial review to the administrative record, the district court stated that it would not try the case de novo but that it would allow the introduction of "supplementary" materials and testimony (Pet. App. Exh. 4, at 28).

Following a trial, the district court entered a preliminary injunction barring the Secretary from reinstating petitioner's leases. Thereafter, the court entered findings of fact and conclusions of law holding, in substance, that the Secretary's non-KGS determinations were arbitrary and capricious (Pet. App. Exh. 4). The district court concluded, among other things, that the Secretary's non-KGS determinations were invalid because USGS had failed to base its determinations on all of the relevant facts. The court set out a partial list of geological and non-geological factors which it believed had to be considered (Pet. App. Exh. 4, at 29). The Arkansas District Court

entered a permanent injunction barring the Secretary from reinstating petitioner's leases or issuing any further leases in Fort Chaffee "until proper KGS determinations of these lands have been made * * *" (Pet. App. Exh. 6, at 29).

5. The Secretary and petitioner appealed, but the court of appeals affirmed (Pet. App. Exh. 6). Initially, the court of appeals rejected the appellants' argument that, in view of the District of Columbia Circuit's direction to the Secretary to reinstate petitioner's leases, the Arkansas district court abused its discretion by denying the transfer motions and, thus, subjecting the Secretary to the possibility of mutually inconsistent judicial orders. The Eighth Circuit observed that the District of Columbia Circuit's decision merely assumed that the non-KGS determinations were valid and accordingly did not preclude courts in other circuits from issuing orders and decisions regarding the Fort Chaffee leases on grounds not presented in the District of Columbia Circuit litigation:

> For our Court to require the Secretary to offer these lands for lease only after a lawful KGS determination does not conflict with the decision of the D.C. Circuit, to which this issue never has been presented. Because we hold these leases invalid notwithstanding the timeliness of TXO's application for them, our mandate necessarily supersedes that of the D.C. Circuit. The parties should not have any doubt that the instant decision now controls this matter.

Pet. App. Exh. 6, at 15.

The court then found that Arkla and the State of Arkansas each had standing to maintain the action; that the MLA created a private right of action for judicial review of the Secretary's decision to issue the

leases; and that, under the circumstances of this case, the plaintiffs were not required to exhaust their administrative remedies (Pet. App. Exh. 6, at 15-28). The court of appeals further ruled that the action was not barred by the statute of limitations or collateral estoppel (Pet. App. Exh. 6, at 20-22).

Turning to the scope of review on the KGS determination issue, the court stated that the Secretary's action could be set aside "if it is arbitrary, capricious, or contrary to law or the Secretary's regulations" (Pet. App. Exh. 6, at 22). The court of appeals acknowledged that the reviewing court "may not consider evidence outside the administrative record for the purpose of substituting its judgment for that of the agency." *Ibid.* But the court of appeals concluded that the district court had considered supplementary evidence of the procedures followed and facts considered by the Secretary. *Ibid.*

The court of appeals ultimately concluded that the non-KGS determinations at issue did not reflect adequate consideration of all relevant factors. In the instances pertinent here, the court found, the USGS geologist had typically made the KGS determinations by simply classifying sections immediately adjoining a section with a producing well—and only those sections—as part of a "known geological structure" (Pet. App. Exh. 5, at 11-12, 23-25). The court ruled that this approach was arbitrary because it failed to require consideration of geological information which might disclose that the KGS should be extended more than an additional section away from a producing section (Pet. App. Exh. 6, at 28-29). The court held, moreover, that the non-KGS determinations were defective because the existence of "competitive interest and risk of exploration were not considered * * *." *Id.* at 30.

Judge Gibson dissented. Judge Gibson stated that despite the district court's contrary protestations, the record disclosed that it had actually conducted a trial de novo and substituted its judgment for that of the Secretary. Judge Gibson concluded that the Secretary's non-KGS determinations had a rational basis in the record and should be upheld.

ARGUMENT

Although we regard the decision of the court of appeals as incorrect on the ultimate question whether the Secretary's KGS determinations should be set aside, this case does not present any issue that warrants review by this Court. The precedential impact of the court of appeals' decision is marginal because the Secretary is now making KGS determinations pursuant to standards and procedures which have been revised since the leases in question were issued. Moreover, while we believe that it would have been preferable to transfer the case to the District of Columbia district court so as to avoid the potential problem of facially conflicting mandates, we do not read the judgment of the court below as requiring the Secretary to take action that is foreclosed under a proper understanding of the D.C. Circuit's judgment. Accordingly, the petition for a writ of certiorari should be denied.

1. Petitioner correctly asserts (Pet. 10-13) that while the District of Columbia Circuit has directed the Secretary to reinstate its leases (see page 6, *supra*), the Eighth Circuit has now ordered him not to do so. It is our view that when one federal court has issued a directive to an executive branch officer to take action with regard to a particular party (here, to issue leases to petitioner), and the legality

of that agency's action is thereafter challenged by a third party in a different federal court, the better practice—assuming that there is no insurmountable procedural barrier—is generally for the second court to transfer the second case to the first court pursuant to 28 U.S.C. 1404. We believe that, in the circumstances of this case, the Arkansas district court should have transferred the present case to the District of Columbia district court, so as to have avoided the development of the *apparent* conflict noted by petitioner.

Nevertheless, the Eighth Circuit's decision in this case does not create any actual conflict that warrants further review. The validity of the Secretary's non-KGS determinations was not at issue in the District of Columbia proceeding, and Arkla and the State of Arkansas were not parties to that action.[5] It is reasonably apparent that the District of Columbia Circuit did not intend its judgment to preclude the Secretary from responding to successful third-party challenges to petitioner's leases on grounds distinct from those considered in the District of Columbia Circuit litigation. In the highly improbable event that the District of Columbia Circuit should subsequently determine that the Secretary must issue the leases to petitioner, notwithstanding third-party litigation, there will be time enough for this Court to review such an order. At present, however, the conflict between the two courts of appeals portrayed by petitioner is purely semantic.

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[5] Arkla filed a brief amicus curiae in the District of Columbia Circuit supporting the Secretary's cancellation of petitioners leases and participated in oral argument (Pet. App. Exh. 2, at 7 n.4). The State of Arkansas did not participate in any capacity.

2. As Judge Gibson concluded in his dissenting opinion (Pet. App. Exh. 6, at 32-35), the record discloses that, despite its statements to the contrary, the district court in fact conducted a de novo hearing and impermissibly substituted its judgment for that of the Secretary. The Secretary's non-KGS determinations had a rational basis and were correct as a legal matter. Indeed, because Congress specifically conferred upon the Secretary authority "to fix and determine the boundary of any structure, or oil or gas field, for the purposes of this chapter" (30 U.S.C. 189), the refusal of the courts below to accord substantial deference to the Secretary's non-KGS determinations was particularly inappropriate.

Nevertheless, the court of appeals' resolution of this issue does not merit further review. As the court of appeals observed (Pet. App. Exh. 6, at 31-32), following issuance of petitioner's leases, the Secretary has, of his own accord, initiated certain new procedures for making KGS determinations. The court of appeals seemingly indicated approval of these procedures. *Ibid.* In view of this apparent endorsement, it is unclear whether the court intended to impose any standards or requirements for making KGS determinations beyond those *currently* being employed by the Secretary. In any event, because a resolution of the KGS issue presented by the petition would necessitate a determination concerning the validity of KGS procedures which have since been superseded, a ruling on that issue here would have relatively little precedential value.[6] Should the court of appeals'

[6] Similarly, the court of appeals' disposition of the statute of limitations issue raised by petitioner (Pet. 20-21) turned exclusively upon the unique facts of this case (Pet. App. Exh. 6, at 20-21). Absent such unusual facts, the 90-day statute

reasoning prove in the future to create a substantial impediment to the operation of the federal onshore oil and gas leasing program, this Court can address the matter in a subsequent case when the nature of any administrative difficulties stemming from the present opinion has become clear.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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of limitations of Section 42 of the MLA, 30 U.S.C. 226-2, will shield leases previously issued under the Secretary's former procedures from third-party attack.

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